NOS. 19-1340, 19-1342, 19-1348, 19-1349

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America		Plaintiff-Appellee
v.	No. 19-1340	
Arkansas Department of Educ., et al		Intervenors-Appellants
Junction City School District, et al		Defendants-Appellees
Rosie L. Davis		Plaintiff-Appellee
v.	No. 19-1342	
Arkansas Department of Educ., et al		Intervenors-Appellants
William Dale Franks		Defendants-Appellees
Mary Turner, et al		Plaintiffs-Appellees
v.	No. 19-1348	
Arkansas Department of Educ., et al		Intervenors-Appellants
Lafayette County School District, et al		Defendants-Appellees
Larry Milton, et al		Plaintiffs-Appellees
v.	No. 19-1349	
Arkansas State Board of Educ., et al		Intervenors-Appellants
Camden Fairview School District, et al		Defendants-Appellees

On Appeal from the United States District Court
For the Western District of Arkansas

Honorable Susan O. Hickey, United States District Judge

BRIEF OF *AMICI CURIAE* BRITTANY HARRISON, LANCE HARRISON, KATELYN WILLIAMS, CHASE WILLIAMS, CHASITY KLUTTS, SARAH MCCOY, AND COLE MCCOY IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Rules and Statutes

Miscellaneous

INTEREST OF *AMICI CURIAE*

Amici Brittany Harrison, Lance Harrison, Katelyn Williams, Chase Williams, and Chasity Klutts currently reside in the Lafayette County School District, and Sarah McCoy and Cole McCoy reside in the Junction City School District. *Amici* are parents of school-age children whose rights under Arkansas's interdistrict public-school transfer laws have been restricted a result of the District Court orders on appeal in this case. *Amici* have an interest in the reversal of the District Court orders for two reasons: (1) to ensure that they have the same rights as other parents in Arkansas to engage in interdistrict public-school transfers in order to obtain the best possible academic opportunities for their children, and (2) to encourage the public school districts in which they currently reside to improve in order to more effectively compete for student attendance. Under the District Court orders at issue, their children are currently required to attend what the parents believe are substandard public schools if they wish their children to attend public school at all. Even worse, their public schools are not encouraged to improve, since they can simply ignore the reasons why parents wish to transfer to other school districts by asking the courts to hold their children hostage in those substandard schools. *Amici* therefore respectfully request to participate in this case in order to present their unique perspective on the harms created by the District Court's orders and to ask that those orders be reversed.

STATEMENT PURSUANT TO FED. R. APP. P. 29(a)4(e)

Pursuant to Fed. R. App. P. 29(a)(4)(e), *amici curiae* state:

1. No party's counsel authored this brief in whole or in part.

2. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief.

3. No person—other than the *amici curiae* or its counsel—contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

SUMMARY OF THE ARGUMENT

Over the years, the federal courts have played a critical role in *increasing* educational opportunities for children by requiring the improvement of recalcitrant school districts around the country through the process of desegregation. The District Court's orders in this case, however, stand in stark contrast to that tradition by *decreasing* educational opportunities for children. Those orders force children in the school districts at issue to remain in public schools that their parents have decided are substandard[1] (or, even worse, push those children out of the public school system altogether) rather than permitting those children the same opportunities given to children throughout Arkansas to attend the public school best suited for their individual needs. This result is neither supported by Supreme Court precedent nor a rational response to the supposed problem that justified these draconian measures. As such, *amici* – parents of children whose rights to select the best public school option for their children are being restricted by the District Court's orders – respectfully request that those orders be reversed.

[1] Whether these schools are in fact "substandard" is not at issue in this case. Rather, the point is that Arkansas law permits parents to decide for themselves whether their resident district is up to their standards and, if not, find another school district that meets their needs. The District Court's orders, however, remove that choice.

The District Court's orders are far outside the scope of permissible remedies under the circumstances at hand. The District Court's orders are premised on its belief that allowing these districts to participate in interdistrict public-school choice *might* cause them to *become* segregated in the future. But the District Court's analysis gets it completely backwards, because the law is clear that any remedy imposed in the name of "desegregation" must be designed to address an *existing* segregative practice. The District Court did not make that link here, and, in fact, ignored repeated warnings from the Supreme Court that the private decisions of parents – like *amici* – to identify the best educational opportunities for their children do not and cannot violate the Constitution.

Not only is the District Court's remedy an improper response to a hypothetical problem, but the remedy itself creates two fundamental constitutional problems. First, it creates an impermissible *inter*district remedy in response to a purported *intra*district issue. While the District Court went to great lengths to explain why its remedy was a mere *intra*district remedy, that remedy *is defined by reference to the racial composition of neighboring districts* and is thus *inter*district by its own terms. Second, the remedy itself is improperly premised solely on the race of the children at issue. Based solely on their race, white children are permitted to transfer to certain districts and barred from transferring to others, while black children are likewise

limited in their ability to transfer. Such a remedy is *prima facie* unconstitutional and should be reversed.

The District Court's opinion is also premised upon an unfounded skepticism of Arkansas's interdistrict public-school choice program. Thousands of children around Arkansas attend public schools outside of their resident districts for a variety of reasons, such as to attend a larger or smaller school, proximity to one's residence, quality of academic programs, bullying, and countless other reasons. The District Court's professed goal of reducing "segregative effects" by forcing children to stay in substandard schools will therefore necessarily fail, because parents barred from engaging in interdistrict public-school choice will nevertheless avoid such schools by moving, homeschooling, or private school. Contrary to the District Court's belief, however, these are significant costs that parents should not be forced to incur. Those substandard schools should be encouraged to *improve* in order to compete for those students, instead of simply ignoring their problems and then asking the federal courts to excuse them from the consequences. Students in such schools should have the same rights as other students in Arkansas to attend the public school that best suits their needs. *Amici curiae* therefore respectfully request that the District Court's orders be reversed.

I. THE REMEDY CHOSEN BY THE DISTRICT COURT HAS NO RELATION TO A CURRENT CONSTITUTIONAL VIOLATION.

Several decades ago, the school districts at issue committed a variety of constitutional violations that subjected them to federal court supervision. The *Turner* decree governing the Lafayette County School District, for example, results from the district's treatment of black students by, among other things, overplacing them in special education class and underplacing them in gifted and talented classes. (JA1118-24.) The Junction City School District, on the other hand, was found to have operated an explicit system of segregated classrooms. (JA53.) What is devoid from the District Court's opinion, however, is any evidence that any of the school districts are *currently* segregated, much less that they are segregated as a result of interdistrict public-school choice. Instead, the District Court's orders are based entirely on the *possibility* that in the future, interdistrict public-school transfers *could* have a "segregative" effect *if* students transfer to other schools in a manner that affects the racial balance of *either* the transferring or the receiving school. Such orders bear no relationship to actual constitutional violations, are wholly improper, and must be reversed.

A. The District Court's Remedy Is Not Linked To Any Current Segregative Practices.

The consent decrees at issue were entered decades ago, and for the most part have laid dormant ever since. The Supreme Court has made clear that the "ultimate

objective" of a desegregation plan is "to return school districts to the control of local authorities." *Freeman v. Pitts*, 503 U.S. 467, 489 (1992). To that end, a court must "provide an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance." *Id.* at 490. Here, however, the District Court has done the opposite – it has expanded its role from addressing past segregation to *preventing future segregation*. Federal courts, however, are not intended to be the permanent overseers of school districts – even if those districts want federal supervision to excuse themselves from the competition for students that otherwise exists throughout Arkansas.

The District Court's concern in this case is not whether there is a *current* harm to be addressed. Indeed, there is nothing in the District Court's orders that discusses the *current* status of the districts in question. Instead, the District Court's concern was with preventing *future* "segregative transfers," which it defined as transfers "to a non-resident district where the percentage of enrollment for the student's race exceeds that percentage in his resident district." (JA1414.) That race-based definition, however, comes from the 1989 Arkansas Public School Choice Act, Act 609 of 1989, which was invalidated as a violation of equal protection. *See Teague ex rel. T.T. v. Arkansas Board of Education*, 873 F. Supp. 2d 1055 (W.D. Ark. 2012), *vacated as moot sub nom. Teague v. Cooper*, 720 F.3d 972 (8th Cir. 2013). And,

more troubling for present purposes, the District Court did not link its definition of "segregative transfers" to anything currently occurring in these districts.

This Court has emphasized that a federal court has the authority to address only those "segregative effects [that] are current." *Edgerson on Behalf of Edgerson v. Clinton*, 86 F.3d 833, 837 (1996). In other words, "[f]ederal courts may not … fashion a remedy to correct a condition unless it *currently* offends the Constitution." *Id.* (quoting *Jenkins v. Missouri*, 807 F.2d 657, 670 (8th Cir. 1986) (emphasis added)). Moreover, "the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 721 (2007). In other words, the "principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself." *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267, 281-82 (1977); *see also Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (same).

The District Court's orders fail to satisfy any of these requirements. The District Court did not determine whether there is a condition that *currently* offends the constitution, much less explain how its orders "directly address and relate to the constitutional violation itself." Instead, the District Court merely assumed that such a condition *might* occur in the future and fashioned a remedy that *might* prevent that condition from occurring. If permitted, such reasoning would give federal courts

timeless authority over desegregation cases so long as the court could fashion some theoretical future harm it seeks to prevent. But "'once the affirmative duty to desegregate has been accomplished,'" the role of the federal courts ends. *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 436 (1976) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 31-32 (1971)). The District Court's concern about possible future effects of interdistrict public-school choice is thus outside its purview.

Indeed, the remedy imposed by the District Court suffers from many of the same infirmities as one previously rejected by the Supreme Court. In *Pasadena*, the school district has unquestionably imposed a "racially neutral attendance pattern in order to remedy the perceived constitutional violations" in the district. *Pasadena*, 427 U.S. at 437. As a result of undisputed demographic changes, however, several of the schools within the district experienced rapid growth in minority student enrollment, and the district court ordered annual changes in attendance zones to account for this growth. *Id.* at 435. The Supreme Court held that such an order exceeded the district court's authority, given that there was no evidence that any racial disparities then existing were vestiges of segregation. *Id.* Likewise, here, there is no evidence of any current conditions that would be remedied by the District Court's orders, much less conditions that are unconstitutional vestiges of

segregation. The District Court's orders thus exceeded its authority and should be reversed.

B. The District Court May Not Bar Parents From Making Choices For Their Children, Even If Those Choices Could Result In "Segregative Effects."

The District Court's orders prevent children from enrolling in another school district because such transfers might have future "segregative effects" on the districts at issue. That logic, taken to its extreme, would also permit the District Court to prevent those children from being homeschooled or attending private schools if such bans might reduce "segregative effects." But the Supreme Court has made clear the racial imbalances have a constitutional dimension only if they result from state action, not private choices made by parents. Where racial imbalances are "a product not of state action *but of private choices*, it does not have constitutional implications." *Freeman*, 503 U.S. 467, 495 (1992) (emphasis added); *see also Parents Involved*, 551 U.S. at 737 (same); *Pasadena*, 427 U.S. at 737 (noting that demographic changes that result in racial imbalance have no constitutional effect). In fact, the Supreme Court has recognized that there are circumstances where such freedom of choice "can serve as an effective device" in pursuing desegregation. *Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430, 440 (1968). By seeking to overcome the potential effects of future private choices by parents seeking

the best educational opportunities for their children by banning such choices, the District Court exceeded its authority.

The District Court took it upon itself to bar private choices that it believed would result in "segregative effects." The Supreme Court, however, has rejected such an expansive view of federal power for reasons both legal and practical:

> It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervisions by the courts of school districts simply because they were once *de jure* segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.

Freeman, 503 U.S. at 495. This rule does not change simply because the District Court labeled the private choices of parents seeking a better school district as a cover for "racial discrimination." (JA664.) As seen in Part IV.B, *infra*, parents seek to transfer school districts for many race-neutral reasons; indeed, thousands of Arkansas students have transferred from majority-white school districts. But no matter what the reason for these private choices might be, the District Court overstepped its authority in trying to prohibit them.

C. The District Court's Remedy Is Simultaneously Unconstitutionally Narrow In Its Application And Overbroad In Its Reasoning.

To read the District Court's orders, one would believe that if students in the districts at issue could participate in interdistrict public-school choice like other

students throughout Arkansas, there would be an immediate and massive shift in demographics resulting in "segregative effects." Arkansas law, however, specifically prevents such a result by limiting the number of transfers that can occur each year. Under Arkansas's interdistrict public-school choice law, annual outgoing transfers are capped at 3% of the district's enrollment. Ark. Code Ann. § 6-18-1906(b)(1). Only a tiny fraction of each district's total enrollment could thus be lost each year – *giving the district ample time to improve before any "segregative effects" could occur*. The District Court, however, never addressed this important limitation.

In *Parents Involved*, the Supreme Court questioned a race-based policy that combated a similarly-narrow problem. In that case, one of the districts in question estimated that its "racial guidelines account for only 3 percent of assignments," an impact identical to the worst-case scenario here. *Parents Involved*, 551 U.S. at 734. The Court held that "the minimal impact of the districts' racial classifications on student enrollment casts doubt on the necessity of using racial classifications." *Id.* If it is impermissible for a school district to use racial classifications to make such a minimal change, a federal court certainly should not *order* racial classifications in order to combat an equally-minimal change. Because that is precisely what the District Court has done here, its orders should be reversed.

It is important to note two important exceptions to the 3% limitation on outgoing transfers imposed by Arkansas law. But although these two exceptions were not directly addressed by the District Court's orders in this case, the same logic would apply to them – with troubling results.

First, Arkansas law permits students in academically-distressed school districts to transfer to another district without counting against the 3% limitation. Ark. Code Ann. § 6-15-2915(d). Such a law is entirely reasonable and rational; students should be permitted to leave a school that has failed to educate them. Under the District Court's rationale, however, a federal court could hold children hostage in failing schools simply because allowing children to transfer from such schools might have "segregative effects."

Second, Arkansas law has created a number of "open-enrollment" charter schools that "may draw its students from any public school district in this state." Ark. Code. Ann. § 6-23-103(9)(A)(ii). There are currently dozens of such charter schools operating around Arkansas, including two online charter schools that can be attended by students from anywhere with a connection to the internet. *See http://www.arkansased.gov/contact-us/charter-schools/charter_school_categories/open-enrollment* (last visited May 3, 2019). Students attending these schools likewise do not count against the 3% transfer rule. But again, under the District Court's rationale, students in these districts could be barred from attending charter

schools if their private decisions resulted in "segregative effects." Although the District Court has not barred these options (yet), the fact that its logic would permit such bans demonstrates how it has overstepped its authority.[2]

II. THE DISTRICT COURT'S ORDER IS *INTER*DISTRICT BY ITS VERY DEFINITION AND THUS AN IMPROPER RESPONSE TO AN ALLEGED *INTRA*DISTRICT PROBLEM.

The District Court was well-aware that it did not have any evidence of an *inter*district constitutional violation. (JA1420-21.) And with good reason, because there is "no presumption that racial imbalances among separate, independent school districts were caused by intentional discrimination." *Edgerson*, 86 F.3d at 837. As a result, the District Court also recognized that its remedy had to be *intra*district in nature. (JA1420-21.) And again, with good reason, given that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." *Milliken v. Bradley* (*Milliken I*), 418 U.S. 717, 745 (1974). As such, "[a] district court seeking to remedy an intradistrict violation that

[2] It is also interesting to note that the Junction City School District obtains approximately 25% of its student body by means of a contract with a charter school in Louisiana. *See https://www.ktbs.com/news/3investigates/la-charter-school-continues-decades-old-arrangement-with-ark-school/article_d730bc42-49a2-11e8-8aa8-5310c28ca883.html* (last visited May 6, 2019). Despite the massive impact of that contract on the student body of that district, nobody has tracked the student population entering that district as a result of the contract, much less how that population affects the racial balance of the district. The District Court's decision to bar transfers out of that district without analyzing the transfers into the district reflects the complete lack of evidentiary justification for its decisions.

has not 'directly caused' significant interdistrict effects … exceeds its remedial authority if it orders a remedy with an interdistrict purpose." *Jenkins*, 515 U.S. at 97 (quoting *Milliken I*, 418 U.S. at 744-45). Yet that is precisely what the District Court did by preventing *inter*district transfers from the school districts at issue.

While the District Court claimed that it imposed a mere *intra*district remedy, its definition of "segregative" transfers demonstrates its *inter*district nature. Again, the District Court adopted the language of the unconstitutional 1989 school choice law to declare that a transfer is "segregative" if it is "to a non-resident district where the percentage of enrollment for the student's race exceeds that percentage in his resident district." (JA1414.) In short, to determine whether a transfer is "segregative," a multi-step process must occur: (1) look at the race of the student (a constitutional violation by itself, as explained in the next section); (2) look at the racial balance of the resident district; (3) look at the racial balance *of the non-resident district*; and (4) deny the transfer as "segregative" if the racial balance of the resident district exceeds that of the non-resident district.[3] That process necessarily involves an *inter*district analysis and thus creates an *inter*district remedy.

[3] It is interesting to note that the District Court's remedy could nevertheless result in "segregative effects" under certain circumstances. The District Court's orders, for example, would permit a white student to transfer to another district with a higher black student percentage if he or she believes that district is better, regardless of the "segregative effects" on the resident district.

The District Court held that its remedy was *intra*district because it "would not directly affect any other school district's ability to participate in school choice or to receive students from other districts that are otherwise eligible to participate in school choice." (JA1422.) But by its very terms, the District Court's order directly affected the rights of every other school district in the state *to receive students from the districts at issue*. Indeed, the District Court recognized that its order created at least a "minor intrusion into other school districts' ability to receive LCSD transfer students." (JA1422.) Yet the District Court did not cite – and *amici* could not locate – any case creating a *de minimis* exception to the rule prohibiting an *inter*district remedy to an *intra*district violation.

The District Court further justified its orders by stating that there is no authority prohibiting a remedy like this. (JA1421.) Yet the remedy it imposed has at least as many – if not greater – *inter*district effects than the remedy invalidated by the Supreme Court in *Jenkins*. In that case, the district court ordered the Kansas City schools to make a number of improvements for the specific purpose of "attract[ing] minority students from outside the KCMSD schools." *Jenkins*, 515 U.S. at 92. The Supreme Court held that this "interdistrict goal is beyond the scope of the intradistrict violation" and criticized the District Court for "devis[ing] a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the interdistrict transfer of schools." *Id.*

Jenkins is impossible to square with the District Court's orders in this case. If it is an *inter*district remedy to *encourage* "the interdistrict transfer of students," it must equally be an *inter*district remedy to *prevent* "the interdistrict transfer of students." At least in *Jenkins*, the district court tried to *improve* the educational opportunities for children in the resident district, whereas the District Court's orders here do precisely the opposite. What the cases have in common, however, is their intended purpose in affecting the relationship between the resident districts and their neighboring districts. *Jenkins* holds that such a purpose is unconstitutional.

III. THE DISTRICT COURT'S REMEDY LIMITS EDUCATIONAL OPPORTUNITIES BASED SOLELY UPON IMPERMISSIBLE RACIAL CLASSIFICATIONS.

The District Court's remedy operates as follows: for each school district at issue, there are a set of school districts to which *only* its white students can transfer, *i.e.* the school districts with a higher percentage of black students than the resident district, and a set of school districts to which *only* its black students can transfer, *i.e.*, the school districts with a higher percentage of white students than the resident district.[4] Any other transfer is classified as an impermissible "segregative" transfer. (JA1414.) Each student is assigned by race to a set of educational opportunities that he or she is allowed to access. While *amici* do not mean to suggest that the District

[4] The District Court's orders are unclear as to how they apply to children of other races, but appear on their face to bar transfers by those children to other districts that have a higher percentage – however small – of their race.

Court intended to create an unconstitutional set of racial classifications, that is the necessary consequence of its chosen remedy.

Parents Involved makes clear that a remedy is unconstitutional if it is structured so that "when race comes into play, it is decisive by itself." 551 U.S. at 723. Like the student assignment plan struck down in *Parents Involved*, the race of the students under the District Court's orders "is not simply one factor in reaching a decision … it is *the* factor." *Id.* (emphasis in original) (citing *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003)). White students can transfer to some schools, black students can transfer to others; such a plan constitutes no more than "outright racial balancing," which is "patently unconstitutional." *Grutter*, 539 U.S. at 330. Even if the District Court were otherwise permitted to ban interdistrict public-school transfers – and for the reasons set forth throughout this brief it may not – by allowing certain transfers and not others based solely upon the race of the student, the District Court's orders here are nevertheless unconstitutional as a violation of equal protection.

IV. THE DISTRICT COURT'S ORDERS ARE BASED UPON AN IRRATIONAL AND COUNTER-PRODUCTIVE HOSTILITY TOWARD INTERDISTRICT PUBLIC-SCHOOL CHOICE.

The District Court's willingness to bar interdistrict public-school transfers in this case appears to have resulted from its belief that such transfers necessarily result from "racial discrimination." (JA664.) But that belief is baseless. Thousands of

Arkansas children of all races currently attend non-resident public schools for a variety of entirely legitimate reasons that have absolutely nothing to do with "racial discrimination." And when, as here, the District Court has barred that option, parents will not meekly accept sending their children to what they perceive to be substandard public schools. Instead, those parents will simply opt out of the public school system altogether, exacerbating the supposed problem the District Court seeks to fix.

A. Interdistrict Public-School Choice Is Widely Practiced In Arkansas By Children Of All Races.

More than 33,000 children in Arkansas currently attend public school in a district or charter school other than their resident district. *See https://adedata.arkansas.gov/statewide/ReportList/Districts/SchoolChoice.aspx* (last visited May 3, 2019). Of those students, 17,985 of them attend open-enrollment public charter schools, and 15,152 attend non-resident public schools. *Id.* Because most charter schools are clustered in central and northwest Arkansas, however, interdistrict public-school choice represents the only public choice option for a vast majority of Arkansans – including *amici* and others living in southern Arkansas, the locations of the school districts at issue here.

The 15,152 students that attend non-resident public schools in Arkansas are scattered throughout the state. Of the 231 districts currently eligible to participate in interdistrict public-school choice, 215 of them (or 93%) have at least one student

attending from outside the district. *Id.* For some school districts, incoming school choice students represent a substantial percentage of their enrollment. In the Poyen School District, for example, 215 of the 594 students (approximately 36.2%) are school choice, many from the much larger neighboring (and majority-white) districts of Malvern and Sheridan. *Id.*; *see also https://adedata.arkansas.gov/statewide/ReportList/Districts/EnrollmentByRace.aspx* (last visited May 3, 2019). In the Bauxite School District, 446 out of 1,698 students (approximately 26.3%) are school choice, many from the much larger neighboring (and majority-white) districts of Benton and Bryant. *Id.* And in the Southside School District, 443 of 1,979 students (approximately 22.4%) are school choice, many from the larger neighboring (and majority-white) Batesville School District. *Id.*

Over 2,500 of the students in Arkansas that participate in public-school choice, or nearly 17% of the total participants, are non-white. *See https://adedata.arkansas.gov/statewide/ReportList/State/SchoolChoiceByRace.aspx* (last visited May 3, 2019). In the districts where the witnesses that supplied declarations in this case seek to transfer their children (JA677-692), that percentage is even higher:[5]

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[5] *See https://adedata.arkansas.gov/statewide/ReportList/Districts/SchoolChoiceByRace.aspx?year=29&search=spring%20hill&pagesize=10*; *https://adedata.arkansas.gov/statewide/ReportList/Districts/SchoolChoiceByRace.aspx?year=29&search=emerson&pagesize=10*; *https://adedata.arkansas.gov/statewide/ReportList/Districts/SchoolChoiceByRace.aspx?year=29&search=smackover&pagesize=10*;

School District	**Percentage of incoming transfer students that are non-white**
Spring Hill	24%
Emerson-Taylor-Bradley	19.8%
Smackover-Norphlet	44.4%
Parkers Chapel	38%

Interdistrict public-school choice is not only common in Arkansas, but throughout the United States. Indeed, 47 states have at least some form of interdistrict public-school choice. *See http://ecs.force.com/mbdata/MBQuestNB2n?rep=OE1801* (listing the open-enrollment policies of each state) (last visited May 3, 2019). Legislators throughout the country have acknowledged the benefits of interdistrict public-school choice, and parents throughout the country are taking advantage of those benefits. The District Court's aspersions on the motivations behind these choices are thus unfounded.

https://adedata.arkansas.gov/statewide/ReportList/Districts/SchoolChoiceByRace.aspx?year=29&search=parker&pagesize=10 (all last visited May 3, 2019).

B. Parents Seek To Transfer Their Children To Another Public School District For Many Reasons That Have Nothing To Do With "Racial Discrimination."

The District Court's belief that interdistrict public-school transfers reflect "racial discrimination" notwithstanding, it cannot be seriously disputed that thousands of Arkansas parents transfer their children to other public schools for reasons that have nothing to do with "racial discrimination." Indeed, the previous section demonstrated that in three districts alone, more than 1,000 students transferred from one majority-white district to another.

The record in this case demonstrates the careful consideration many parents give to determining the best educational opportunities for their children. The record contains four parent declarations: (1) Elizabeth Black, who seeks a transfer from the Hope School District to the Spring Hill School District (JA677-80); (2) Michelle Gardner, who seeks a transfer from the Lafayette County School District to either the Emerson-Taylor-Bradley School District or the Spring Hill School District (JA681-83); (3) Randi Landry, who seeks a transfer from the Camden-Fairview School District to the Smackover-Norphlet School District (JA687-90); and (4) Megan Livingston, who seeks a transfer from the Junction City School District to the Parkers Chapel School District (JA691-92). Each gives powerful, non-discriminatory, reasons for wanting to transfer to another district.

All four declarants cite quality of education as a reason for transfer, and with good reason. The State of Arkansas prepares an annual report card for each school in Arkansas, which "allows the public to search and compare public schools and districts from across the State of Arkansas." *See https://myschoolinfo.arkansas.gov/* (last visited May 3, 2019). The four declarants, if their requests were granted, would each move their children to a school at least one letter grade higher than the current school: (1) for Ms. Black, from a C to a B; (2) for Ms. Gardner, from an F to a B; (3) for Ms. Landry, from a C to a B; and (4) for Ms. Livingston, from a D to a B. *Id.* Under the criteria used by the State of Arkansas to grade schools, declarants have given an objectively race-neutral reason to seek their transfers.

Each parent also gave other, more personal reasons for wanting to transfer. In Ms. Black's case, her older child is already attending the Spring Hill School District, after leaving the Hope School District as a result of repeated assaults and bullying. (JA677-78.) Ms. Gardner states that her chosen elementary school is closer to her residence than her district school. (JA683.) Ms. Landry cites an older child already attending the Smackover schools, which are closer to her home, as well as concerns about safety in the Camden-Fairview schools.[6] (JA687-88.) And Ms. Livingston

[6] Ms. Landry's fears are well-grounded, as the Camden-Fairview School District ranks third-highest in Arkansas in student assaults and eighth-highest in staff assaults. *See https://adedata.arkansas.gov/statewide/ReportList/Districts/DisciplinaryInfractions.aspx* (last visited May 3, 2019). The Hope School District from which Ms. Black seeks a transfer also fares poorly in both categories. *Id.*

states that she lives closer to the Parkers Chapel schools than to her district school. (JA691.) These reasons are representative of the decisions regarding the best schools for their children that thousands of Arkansas parents make each year, decisions that have nothing to do with "racial discrimination." Parents who live in the districts at issue should receive the same opportunity to make those decisions as every other parent in the state of Arkansas.

C. Forcing Parents To Send Their Children To Substandard Public Schools Will Simply Cause Many Parents To Opt Out Of Public School Entirely.

The District Court's remedy necessarily assumes that barring interdistrict public-school choice transfers will necessarily reduce future "segregative effects" in the districts at issue. But the District Court itself acknowledges that parents have options to avoid staying in these schools, such as moving to a new school district, home schooling, or sending their children to private school. (JA1466.) And although the District Court casually assumes that these non-public options are without harm (*id.*), and ignores the vast amounts of time or money necessary to exercise them, it was certainly correct in recognizing that parents who want the best education possible for their children will not simply stay in schools that they believe to be substandard. Barring those parents from the lowest-cost option of an interdistrict public-school transfer will do little to affect the racial balance at the schools at issue,

but will instead cause parents living in those districts to pursue other options at greater costs to themselves.

The record in this case firmly illustrates the lengths to which parents will go to avoid what they believe to be substandard schools. Ms. Black, for example, states that she will put her child in private school if she cannot transfer, even at "significant financial hardship on my family." (JA679.) Ms. Gardner states that she will continue to send her children to private school, "which will continue the financial strain on my family," or perhaps even homeschool them. (JA682.) Likewise, Ms. Landry is considering homeschooling or even moving if necessary. (JA689.) And Ms. Livingston states that her family will consider private school. (JA692.) Each of them makes clear, however, that attending their current resident school district is not an option. The District Court's orders will not reduce future "segregative effects" by requiring these parents to send their children to their resident school districts; they will only increase the burdens on parents who just want the best possible educational opportunities for their children.

For these reasons, it is difficult to understand exactly what the District Court believes its orders will accomplish. The declarants in this case – like other parents in these districts who might wish to participate in interdistrict transfers – believe that their resident school districts are not good enough. Certainly that belief will not change simply because those schools have now had a federal court prohibit their

children from attending any other public school. Indeed, the *only* way that the District Court's orders could have the desired effect is if a critical mass of those parents will now choose to leave their children in schools they believe to be substandard. But even the District Court recognizes that this may not be the case. The District Court's remedy is therefore not only cruel, but it will be completely ineffective.

V. THE BEST WAY TO IMPROVE THE DISTRICTS AT ISSUE IS BY FORCING THEM TO COMPETE FOR THEIR STUDENTS WITH THEIR NEIGHBORING DISTRICTS.

If Myspace had filed a lawsuit ten years ago stating that it could not compete with Facebook, and thus the courts should bar Myspace's current customers from migrating to Facebook, it would have been thrown out of court and sanctioned under Rule 11. And rightly so, because the laws of this nation reflect the fundamental principle that the best results will be obtained through free and open competition, even if there are winners and losers from that process. *See, e.g.*, *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) ("[T]he freedom guaranteed each and every business, no matter how small, is the freedom to compete – to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.").

In enacting the Public School Choice Act of 2015, the Arkansas General Assembly made clear that it wanted to bring those same principles to public

education in the state of Arkansas. The General Assembly recognized the benefit to students and parents of more options, finding as follows:

> The students in Arkansas's public schools and their parents will become more informed about and involved in the public educational system if students and their parents are provided greater freedom to determine the most effective school for meeting their individual educational needs. There is no right school for every student, and permitting students to choose from among different schools with differing assets will increase the likelihood that some at-risk students will stay in school and that other, more motivated students will find their full academic potential.

Ark. Code Ann. § 6-18-1901(b)(1). Similarly, the General Assembly found that parental choice would force schools to improve in order to avoid losing students to other districts:

> Giving more options to parents and students with respect to where the students attend public school will increase the responsiveness and effectiveness of the state's schools because teachers, administrators, and school district board members will have added incentive to satisfy the educational needs of the students who reside in the district.

Ark. Code Ann. § 6-18-1901(b)(2). As explained above, schools that have been able to satisfy the demands of parents and students (like the Poyen and Bauxite schools discussed above) have been able to flourish under this system, attracting new students and the state funds attendant therewith.

The school districts in this case, however, have not flourished under this system. Instead, they have chosen to take the role of Myspace in our hypothetical.

Rather than try to compete with Facebook, these schools went to federal court and asked to be *excused from the competition*. These schools implicitly concede that they may lose if forced to compete, and thus asked the District Court to force their customers to remain loyal to them if they want to attend public school at all. And while it is no surprise that the administrators of the school districts in question made such a request, it is disappointing that a federal court approved it.

As should be obvious, the only losers in this case are the parents and students who are now forced to remain in substandard public schools or to leave the public school system altogether. By removing any incentive from the schools at issue to improve, the District Court's orders have only guaranteed that these schools will continue to fall further behind their neighbors. As the gap grows, the urgency parents will feel to leave the schools through whatever means necessary will similarly increase, and the very effects the District Court seeks to prevent – massive student losses in these districts – will be the ultimate result.

Competition is the solution, not the problem. By failing to recognize that fundamental truth, the District Court has implemented a remedy that will harm the very students it unquestionably wanted to protect.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully suggest that the District Court's orders in this case be overturned and that parents in these districts be permitted the same opportunity as parents throughout Arkansas to select the public school that best suits their children.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify, on this 8th day of May, 2019, that this brief complies with the following requirements pursuant to the rules of the United States Court of Appeals for the Eighth Circuit and the Federal Rules of Appellate Procedure:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,367 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)].

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief bas been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

/s/ Chad W. Pekron
Chad W. Pekron

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to all counsel of record.

/s/ Chad W. Pekron
Chad W. Pekron